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MARKET RESEARCH—A TALE OF TWO MARKETS

“Never Shall The Twain Meet”

The Federal Supply Schedule Market is distinct from the Open Market, and the research and acquisition planning requirements differ. Knowing these differences can produce innovation and efficiency in delivery of products and services to the warfighter.

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Introduction

In today’s complex operational contracting environment, there are competing goals that must be balanced in order to forge optimal solutions. Arguably the four most important goals in acquisition are: competition, obtaining good and services at fair and reasonable prices; providing maximum practicable opportunity for small businesses; and ensuring the highest-quality mission execution. To deliver viable solutions, the contracting professional must have a sound understanding of the laws, regulations, and policies that affect execution of contract requirements—especially during the requirements formation and source selection phase of an acquisition. The correct application of the law results in the elimination of unnecessary steps in the acquisition process and allows the contracting professional to deliver cutting-edge solutions while accomplishing most—if not all—of the Government’s priorities.

The key to successfully balancing these important priorities is knowledge-based action¹. In order for contracting knowledge to be actionable, it must inform the contracting professional of what is required. Once contracting professionals know what is required, they are equipped to know what is optional and the range of solutions that may be crafted to meet the Government needs. This foundational understanding is ***the engine of innovation and efficiency***. A contracting professional armed with actionable knowledge is now prepared to navigate the laws and regulations ***based on what they actually say*** vice operating in accordance with urban legend. This makes the contracting professional a better collaborator/negotiator with other stakeholders (whose assertions are sometimes contrary to law and regulation) in the acquisition process and equips them to deliver products and services effectively while delivering maximum value to the tax payers.

¹ The “knowledge-based action” paradigm is based on the belief that courts and judicial forums interpret the law and resolve the conflicts of disparate interpretations put forth by various stakeholders in Federal acquisitions. The two principle Government contract judicial forums are the Government Accountability Office (GAO) and the Court of Federal Claims (COFC). The Small Business administration also has a judicial forum; however, the topics discussed under this treatise are not within the SBA’s jurisdiction.

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This treatise will focus on market research and acquisition planning in the FSS and open market because these activities are arguably the most important activities that are performed in an acquisition, but they are also the two areas where inaccuracies are perpetuated and wasted effort abounds. The traditional processes and efforts are lauded as thorough, complete and conscientious, but these methods often obstruct the execution of requirements in the most optimal manner. That is—in a way that furthers an optimal mix of Government priorities.

Open Market vs. the Federal Supply Schedule Market

In order to be successful in delivering innovative solutions to the warfighter, the contracting professionals must understand that – legally speaking—there are two different markets that exist in Federal procurement: Open Market and Federal Supply Schedule Market.

Open Market contracting is any acquisition that exists outside of the Federal Supply Schedule program². The acquisition procedures used to acquire products and services in the open market are generally FAR Parts 13, 14, & 15 as supplemented by other FAR Parts like 12, 35 and 36. Open market acquisitions are subject to FAR 19 prescriptions and procedures during the market research and acquisition planning phase.

The Federal Supply Schedule or Multiple Award Schedule (MAS) program is directed and managed by GSA and provides Federal agencies with a simplified process for obtaining commercial supplies and services at discounted prices associated with volume buying. A simplified process means that the contracting professional may execute an acquisition without the encumbrances to efficiency caused by the prescriptions and law as applicable to acquisitions executed under the authority of other FAR parts. GSA has done many things to facilitate ordering, but in addition, schedule and BPA orders are generally not subject to the prescriptions and processes of FAR Part 19 or other small business regulations.³

The two markets should be utilized separately because they diverge in the following ways: (1) distinct analyses requirements, (2) distinct market research adequacy thresholds, and (3) they occasion distinct interactions with the small business lobby. Therefore, market research should be conducted in one market or the other to avoid confusion about which procedures apply to the acquisition. Even if the CO conducts market research in both markets, the CO should decide which market best supports the agency’s needs and proceed accordingly. Once the decision is

² Except FAR 16 purchases.

³ FAR 19 and other small business rules apply during FSS acquisitions under the following conditions: (1) bundled contracts ([FAR 8.404\(a\)](#)), (2) the rules pertaining to small business programs when using the discretionary set aside authority of [FAR 8.405-5](#) and (3) Consolidated requirements. [See 13 CFR 125.1\(c\)](#)

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made as to which market to use for the procurement, the CO should execute the acquisition in accordance with the prescribed processes and procedures of that market.

Common Myths

This section debunks some of the more pernicious urban legends that encumber efficiency and innovation. The myths and the actual law are as follows:

Myth One: A contracting professional must survey the open market and the Federal Supply Schedules in order satisfy the requirements of FAR Parts 7 and 10.

Answer One: **False.** When following FAR Part 8 procedures, compliance with acquisition planning as prescribed by FAR [8.404\(a\)](#) is fulfilled by doing research only among FSS holders⁴. In fact, FAR [8.404\(a\)](#) instructs the user not to seek competition outside of the schedules. Numerous judicial decisions substantiate that market research is adequate (i.e. legally sufficient) when conducted only among FSS contract holders:

In SRC, Inc. ([B-284943](#); [B-284943.2](#)) GAO states the following:

“SRC also asserts that the IRS did not adequately conduct acquisition planning and market research, as required by FAR parts 7 and 10, in deciding to satisfy its needs under the FSS program. Protester’s Comments at 17–20. The crux of SRC’s argument is that adequate acquisition planning and market research would have compelled the IRS to conduct its procurement outside the FSS program and to consider SRC’s offer. *Acquisition planning and market research are required to ensure that agencies, among other things, develop a plan to suitably satisfy their needs in a timely manner and at a reasonable cost. See FAR §§ [7.101](#), [10.000](#). The FSS program specifically satisfies these goals by allowing the government to acquire a wide range of commercial products and services in a timely fashion and at fair and reasonable prices. Thus, we think that, as a general rule, obtaining information from the FSS program and FSS vendors satisfies the agency’s obligations to conduct procurement planning and market research.*”

In Cannon ([B-232262](#)) GAO States the following:

“As a preliminary matter, we find Canon's claim that the Army failed to properly plan this procurement to be without merit.Market research can include obtaining information from sources such as the Federal Supply Schedules FSS FAR Sec. 11.004(d) and market surveys may range from written or telephonic contact with knowledgeable federal and nonfederal experts to more formal "sources sought" notices FAR Sec. 7.101 FAC 84-39. Here, the Army prepared a matrix of those features representing its

⁴ [FAR 8.404\(a\)](#) expressly states that ordering officials shall not seek competition outside of the Federal supply Schedules or synopses the requirement. If it is possible to use the schedules to acquire the product or service, it is clear that it is the law’s intent that the Contracting professional, do just that. This acquisition paradigm is expressly stated when limited source justifications are written. [FAR 8.405-6 “Limiting Sources”](#) requires that the content of limited source justifications provide a description of the market research **conducted among schedule holders**. To summarize, it is clear that Congress intended agencies to use the simplified procedures of that program and not complicate or mix it with other acquisition procedures.

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minimum needs for the various volume bands and determined that three manufacturers' copiers, currently in use at Fort Hood, could meet the requirements of all four volume bands. *Based on an FSS features matrix for various copiers, the Army determined that five manufacturers could meet all four volume bands' requirements. /2/ In addition the record reflects that single vendor, cost-per-copy services contracts were successfully tested at two other Army installations. Under the circumstances, we find that the Army conducted sufficient planning before issuing this RFP.*

Myth Two: The rule of two analysis ⁵(supported by market research) is a distinct step in acquisition planning phase that necessarily precedes the selection of a contract vehicle.

Answer Two: In the open market the rule of two analysis is required before a contract vehicle is selected.⁶ However, FSS orders are specifically exempted from this process.⁷ When using the FSS the ordering agency may fulfill its requirements without performing the rule of two analysis required during the acquisition planning phase of open market procurement.⁸ In addition, FAR [8.404\(a\)](#) and [38.101](#) provide that FAR part 19 pertaining to small business programs, do not apply to BPAs or orders placed against FSS contracts. Moreover, FAR [19.502-1](#), “Requirements for Setting Aside Acquisitions” specifically exempts Federal Supply Schedule contracts.⁹

Myth Three: All requirements that are under \$150,000 are automatically reserved for small business, irrespective of the venue.

Answer Three: False. The automatic set-aside rule of FAR Part 19 for acquisitions under \$150,000 does not apply to FAR Part 8.4 acquisitions. See Fitnet Purchasing Alliance ([B-309911](#)) November 2007.

Myth Four: Once the CO sets an acquisition aside, he or she may not withdraw it without coordinating with SBA in accordance with FAR [19.506](#).

⁵ As set forth in [FAR 19.502-2\(b\)](#), commonly known as the “Rule of Two,” federal agencies must set aside acquisitions worth more than \$150,000 for small businesses when there is a reasonable expectation that (1) offers will be received from at least two responsible small business concerns offering the products of different small business concerns, and (2) award will be made at fair market prices. This rule predates the FAR and is intended to implement the provisions of the Small Business Act which require that small businesses receive a “fair proportion of the total purchases and contracts for property and services for the Government.”

⁶ See [Mori Associates, Inc. v. United States No. 10-298C Dec 2011](#)

⁷ [Mori Associates, Inc. v. United States No. 10-298C Dec 2011](#); Delex Systems, Inc. ([B-400403](#)) October 2008, & Edmond Computer Company ([B-402863](#); [B-402864](#)) Aug 2010

⁸ This is not to say that the CO should not provide maximum practicable opportunities for small businesses. I am pointing out that the CO has much more latitude in the methods used to accomplish agency small business goals. Set asides are not the only tool available.

⁹ SEE FAR [19.502-1\(b\)](#)

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Answer Four: In the open market this is correct. However, set aside withdrawal requirements do not apply to FSS purchases because the CO is not required to set the acquisition aside in the first place.^{[10](#)}

Myth Five: A CO cannot extract a requirement from the 8(a) program even though market research indicates that it is in the Government’s best interest to do so.

Answer Five: If the CO needs to procure the item or service in the open market, the previous statement is true. Generally the agency cannot remove a requirement from the 8(a) program without SBA concurrence. However, this restriction does not apply if the requirement is procured using the Federal Supply Schedule program.^{[11](#)}

Myth Six: SBA Procurement Center Representative (PCR) concurrence^{[12](#)} is required before the Contracting Officer can proceed with an acquisition. If the Contracting Officer proceeds, he or she could be subject to an SBA judicial action.

Answer Six: **False.** The PCR’s input is only a recommendation. If the Contracting Officer (with the support of other agency officials) determines that the acquisition should move forward in a manner that is contrary to the PCR’s recommendation, the acquisition may proceed.^{[13](#)} The Contracting Officer’s acquisition strategy may be protested, but only before the GAO, COFC, or other judicial forum.

¹⁰ Global Analytic Information Technology Services, Inc. [B-297200.3](#) March 2006 & Millennium Data Systems, Inc., [B-292357.2](#) March 2004.

¹¹ [K-Lak Corporation v. United States No 09-771C March 2011](#). SBA Regulations referenced in this case have been updated. 13 CFR 124.504(e) referenced in the decision no longer exists. It has been replaced by [13 CFR 125.504\(d\)](#) to state SBA requires permission for release. The final rule making this change was published in the Federal Register [Volume 76, No. 29 February 11, 2011](#). Reference page 8240 & 8260 regarding release from the 8(a) program. However, there has been no change in the statutes(s) pertaining to the applicability of FAR 19 procedures to Federal Supply Schedule purchases (except for bundling and consolidation) and how acquisitions may be conducted under the authority of FAR part 8.4. **It is the author’s opinion** that even when SBA rejects the CO’s request to withdraw a requirement from the SBA program (the exact circumstance addressed in this case) the CO is not legally bound to follow this guidance when acquiring the required products and services via the Federal Supply Schedule program.

¹² Proceeding when there is disagreement is not to say that the CO does not coordinate the requirement with the Office of Small Business Programs (OSBP). In DoD the CO is still required to coordinate with the Office of Small Business Programs (OSBP) on all acquisitions (including FSS orders) over \$10K [IAW DFAR 219.201](#), unless an exception applies. In addition for DOD, when the acquisition exceeds \$8M, the acquisition strategy must also be coordinated IAW [FAR 7.104\(d\)\(2\)\(i\)](#).

¹³ [FAR 19.505\(f\)](#)

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Myth Seven: If the agency rejects the small business specialist’s or PCR’s recommendation during a Federal Supply Schedule procurement, the agency must follow the procedures in [FAR 19.505, “Rejecting Small Business Administration Recommendations”](#).

Answer Seven: False. In open market procurement, the PCR/SBA can appeal to the head of the contracting activity and ultimately to the head of the agency and under normal circumstances, the Contracting Officer must suspend the action until there is a resolution. Federal Supply Schedule procurements are not subject to the dictates of FAR part 19 even though the DFARS says that the Contracting Officer must coordinate via the DD2579. The PCR may appeal the Contracting Officer’s decision, but there is no requirement to suspend the acquisition as there would be under an open market procurement.

Myth Eight: Even though FAR part 8 purchases are exempt from FAR part 19, the requirement to perform the rule of two analysis is set forth in the Small Business Act, which takes precedence over the Federal Supply Schedule program.

Answer Eight: False. In Edmond Computer Company ([B-402863](#)), the GAO states, “Nothing in the Small Business Act suggests or requires that the Rule of Two—which is set forth in the regulations to implement the Act, takes precedence over the Federal Supply Schedule Program”

Myth Nine: The agency is exempted from applying the rule of two analysis in the Federal Supply Schedule program only if the schedule is mandatory.

Answer Nine: False. See Edmond Computer Company ([B-402864](#)) page 3.

Myth Ten: Use of the Federal Supply Schedules does not comply with the tenants of the Competition in Contracting Act, because it limits competition.

Answer Ten: False. The Federal Supply Schedule procedures are specifically enumerated as one of the procedures that comply with full and open competition requirements.¹⁴

Conclusion

The foregoing analysis demonstrates the following:

- (1) That an agency satisfies its statutory obligation to conduct market research and acquisition planning when conducting market research only among FSS contract holders.

¹⁴ FAR [6.102\(d\)\(3\)](#) & Encompass Group, LLC ([B-409975](#)) September 2014.

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- (2) That a Contracting professional should consider operating in one market or the other when conducting market research and acquisition planning.
- (3) That the dictates of FAR part 19 do not apply to FSS acquisitions during the market research and acquisition planning phases of a procurement. This means that there is no rationale to require the Contracting Officer to prove or disprove the capability of small businesses to meet the requirement. The market research should consist of clarifying agency needs and market capabilities and identifying vendors on the schedule who can meet the requirement.
- (4) That the Federal Supply Schedule offers additional flexibilities in doing what is in the best interest of the Government and meeting the agencies small business goals.

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Appendix I – Acquisition Approaches that Assist the Contracting Professional to Balance Agency Goals

There are at least three strategies that the contracting professional can use accomplish most, if not all, of the Government’s priorities. In addition, these strategies provide for the accomplishment of agency goals while promoting efficiency and simplicity under the authority of the Federal Supply Schedule, as intended. The three strategies include: the rule of three, unrestricted acquisitions with a small business preference and FSS Contractor Teaming Arrangements.

(1) Rule of Three

The rule of three will assist the agency to meet the requirements of GSA schedule orders, provide maximum practicable opportunity for small businesses, increase agency effective competition statistics, reap lower prices via competition, and ensure high-quality mission execution. The rule of three contributes to these goals in the following way:

Maximum Practicable Opportunities for Small Businesses: The discretionary rule of three would still provide maximum practicable opportunities to the small business industrial base while balancing this goal with other Government priorities.

GSA Requirements: Except when solicitations are published on e-buy, GSA requires that when the agency receives less than three *technically compliant/acceptable* quotations in response to a solicitation above the SAT, the agency must write a determination setting forth the steps that it took to ensure at least three quotations were received. The rule of three promotes the program goal of receiving three or more quotations and promoting effective competition.

DoD Effective Competition Rate: If the rule of three is implemented on GSA purchases, it would help the agency to increase its effective competition rate by improving the chances of getting two or more viable quotations in response to agency’s solicitations.

Fair & Reasonable Pricing: Robust competition always leads to enhanced solutions and better pricing for the Government.

High-Quality Mission Execution: The discretionary rule of three increases competition, which drives innovation and excellence in Government and commercial contracting.

(2) Unrestricted Acquisition With A Small Business Preference

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In accordance with FAR [8.405-5](#), the Federal Supply Schedules allow the Contracting Officer to execute a discretionary set aside. However, [FAR 8.405-5\(a\)\(2\)\(ii\)](#) informs the Contracting Officer that when a procurement is set aside under the schedule, the specific small business program requirements identified in FAR 19 apply. Depending on the exact nature of the acquisition, this could bring in unnecessary complexities in award administration of these contracts due to small business program rules and compliances which are often nuanced. In keeping with the express purpose of the Federal Supply Schedule to provide a simplified process for obtaining commercial supplies and services and in accordance with [FAR 8.405-5\(c\)](#) ordering agencies may consider socio-economic status when identifying contractors for consideration or competition for award of an order or BPA.

This consideration may take the form of small business status being included in the evaluation as a principle or heavily weighted evaluation factor.¹⁵ In BPA competitions, this approach tends to produce an outcome that awards most orders or BPAs to small business and a small portion of the awards for large business. It is probable that most orders under the instrument will go to small businesses.¹⁶

In addition, when competing orders under a multiple award BPA that contained both large and small vendors, the agency may also utilize evaluation preferences for any small business socio economic categories to achieve agency goals. This approach is a win-win. It produces competition, high-quality execution for the program, fair and reasonable prices, and allows the agency to meet and exceed its small business goals.

Unrestricted competitions small business preference specifically contributes to the achievement of the Government’s goals in the following ways:

Maximum Practicable Opportunities for Small Businesses: An unrestricted acquisition with a preference for small businesses provides maximum practicable opportunities to the small business industrial base as prime contractors while balancing this goal with other Government priorities.

¹⁵ This is possible because FAR 19 does apply to the establishment of Federal Supply Schedules. During the competition small business representations were made. After verifying their socio economic status (via receipts and other small business program requirements) GSA awarded a schedule from which agencies may obtain small business credit when awarding orders. In accordance with [FAR 8.405-5\(b\)](#), ordering agencies should rely on the small business representations made by schedule holders at the contract level.

¹⁶ It is preferable to track the amount of business that the small business is actually performing because FAR [8.405-5\(b\)](#) states that the agency may receive small business credit if the small business meets the size standard. This can only happen if the small business(es) are performing the majority of the requirement.

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DoD Effective Competition Rate: An unrestricted acquisition with a small business preference will provide for a robust competition because firms of all sizes can compete. The approach would assist the agency to increase its effective competition rate by improving the chances of getting two or more viable quotations in response to agency’s solicitations.

Fair & Reasonable Pricing: The increased competition produced by unrestricted acquisitions with a small business preference will increase competition, which always leads to enhanced solutions and better pricing for the Government.

High-Quality Mission Execution: An unrestricted acquisition with a small business preference will drive innovation and excellence in contracting because competition breeds these qualities. In addition, this approach allows seamless large business involvement to support agency requirements. When a BPA is populated by large and small business concerns, the agency does not have to justify the use of a large business (via market research), it just simply conducts its competition and awards to the best value contractor.

(3) Contractor Teaming Arrangements (CTAs)

Contractor Teaming Arrangement allows two or more prime contractors to team in order to provide a total solution to the Government. The team members may be small or large business concerns. CTAs contribute to the achievement of the Government’s goals in the following ways:

Maximum Practicable Opportunities For Small Business: CTAs may be structured to give small businesses the majority of the award dollars while providing the total solution that is required by the agency programs. If the CTA provides the majority of dollars to small businesses, the agency may take small business credit for the contract.

DoD Effective Competition Rate: CTAs improve effective competition by reducing risk to contractors and making opportunities more appealing. A small company may partner with a large company without the entanglements that are caused by regulations such as the ostensible subcontractor rule, affiliation rules, and other factors that can invalidate awards.

Fair & Reasonable Pricing: CTAs increase the attractiveness of requirements and the robustness of competition; thereby providing the Government with adequate price competition and fair and reasonable pricing.

High-Quality Mission Execution: CTAs are very useful for high-quality mission execution because they allow the Government to procure services from high-quality contractors of disparate disciplines and business sizes. In addition, mission execution is further enhanced by

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alleviating the prospect of the acquisition being invalidated or derailed by the application of the ostensible subcontractor rule when a large business performs vital parts of the work or other encumbrances.